82-677

No.

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,

Appellants,

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

Appellees.

On Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

LEONARD WAYNE SCOTT
Counsel of Record
GARY PINNELL
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Appellants

October 19, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state tax collector may seize personal property to satisfy a claimed tax delinquency consistent with the Fourteenth Amendment pursuant to a statute which provides for no pre- or post-seizure review of the official's actions.

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PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,

Appellants,

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

Appellees.

On Appeal from the Supreme Court of Texas

JURISDICTIONAL STATEMENT

Phillips Crane & Rigging of San Antonio, Inc. and Delmar Phillips, the appellants (Phillips),[1] appeal from the final judgment of the Supreme Court of Texas, dated May 12, 1982, on which a Motion for Rehearing was overruled on July 21, 1982, holding that Article 7266, Texas Revised Civil Statutes, is not unconstitutionally repugnant to the Fourteenth Amendment to the Constitution of the United States. Ben B. Shaw was sued in both his individual and official capacities. Since the issuance of the decision sought to be reviewed, he has been succeeded in office by Rudy Garza. The appellees are described in this Jurisdictional Statement as the collector.

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[1] Phillips Crane & Rigging of Houston, Inc., is a corporation affiliated with the appellants. This disclosure is made pursuant to Supreme Court Rule 28.1.

OPINIONS BELOW

The opinion of the Supreme Court of Texas, which is reprinted in the appendix at page 1a, is reported at 636 S.W.2d 186. The judgment of the district court dated November 19, 1981, and the stipulated facts approved by the district court on the same date are not reported. They are reprinted in the appendix at pages 16a and 18a, respectively.

JURISDICTION

This is an appeal from a final judgment of the Supreme Court of Texas reversing the district court's holding of unconstitutionality of a state statute and vacating the permanent injunction issued by the lower court. The supreme court held that Article 7266, Texas Revised Civil Statutes is constitutional and does not violate the Due Process Clause on the Fourteenth Amendment.

The judgment of the Supreme Court of Texas was issued on May 12, 1982. A timely motion for rehearing was filed on May 27, 1982, and was denied on July 21, 1982. The judgment of the Supreme Court of Texas appears at page 6a. A notice of appeal was filed in the Supreme Court of Texas on July 26, 1982, (App. 22a) and a supplemental notice of appeal was filed in the Supreme Court of Texas on October 14, 1982. (App. 23a). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges of immunities of the citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law . . . .

Texas Revised Civil Statutes Annotated Article 7266 (1960):

> If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the Comptroller, the tax collector shall, by virtue of his tax roll, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the Comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the tax collector by the Comptroller. The Comptroller shall forward said list of paid taxes on or before the first day of February of each year; and the tax collector shall, immediately on receipt of said list from the Comptroller, levy on and sell the property of such nonresidents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes.

Texas Revised Civil Statutes Annotated Article 7273 (1960):

> In making sales of personal property for taxes, the collector shall give notice of the time and place of sale, together with a brief description of the property levied on and to be sold, for at least ten days previous to the day of sale, by advertisements in writing to be posted at the courthouse door, and at two other public places in the county; and such sale shall take place at the courthouse door of the county in which the assessment is made, by public auction.

RAISING THE FEDERAL QUESTION

The federal question was raised at all stages of this proceeding. A specific holding of unconstitutionality was made by the district court (App. 16a), and the Supreme Court of Texas considered and expressly rejected the federal constitutional challenge.

STATEMENT OF THE CASE

The facts of this case were stipulated by the parties and the stipulation was approved by the trial court. (App. 18a).

Statement of Facts

The legal aspects of this case began on February 19, 1976, when both appellants were sued for allegedly delinquent personal property taxes. (Stip. ¶ 9, App. 19a). While this suit was still pending, Ben B. Shaw, then the Tax Assessor-Collector of Bexar County, Texas, levied upon, seized and took into his possession personal property of the appellants in order to satisfy the claimed tax delinquency. (Stip. ¶ 5, App. 18a). The taxes for which the seizure was instituted were the same taxes claimed in the collector's suit. (Stip. ¶ 11, App. 19a). By a Notice of Tax Sale, the collector proposed to sell Phillips' property 20 days later to satisfy the alleged tax delinquency. (Stip. ¶ 7, App. 18a). The fair market value of the seized property greatly exceeded the amount of taxes claimed by the collector. (Stip. ¶ 12, App. 19a-20a).

The Proceedings Below

In response to the seizure, Phillips instituted a suit in state district court seeking to enjoin the proposed tax sale and for a declaratory judgment of the unconstitutionality of the tax seizure statute under which the collector acted. (App. 1a). The trial court denied a temporary injunction, and the interlocutory judgment was appealed. (App. 2a). The court of civil appeals issued

its own temporary injunction to preserve its jurisdiction pending a hearing on the merits.[2] (App. 2a). When the court of civil appeals considered the case on the merits, it held the challenged statute unconstitutional under the Fourteenth Amendment.[3] (App. 2a). That holding of unconstitutionality was appealed to the Supreme Court of Texas, which declined review, holding that the court of civil appeals properly decided the temporary injunction question, but expressly reserving the constitutional issue.[4] (App. 2a). The case was returned to the trial court, which held article 7266 unconstitutional and issued a permanent injunction against the sale of the seized property. (App. 2a, 16a). From that judgment, a direct appeal was taken to the Supreme Court of Texas which noted that the "sole issue before us is whether Article 7266 is unconstitutional for lack of due process safeguards." (App. 2a).

The Supreme Court of Texas considered Phillips' Fourteenth Amendment claims, and rejected them. Holding the statute constitutionally valid, the court dissolved the injunction, thus clearing the way for the sale of the property. In a timely motion for rehearing, Phillips urged that due process was not satisfied because of the lack of a provision for a pre-seizure hearing. The motion for rehearing was overruled without further opinion. (App. 6a).

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[2] The opinion of the court of civil appeals in the original injunction proceeding is reported at 607 S.W.2d 1, and is reproduced in the Appendix at page 13a.

[3] The opinion of the court of civil appeals on the merits is reported at 610 S.W.2d 533, and is included in the Appendix at page 8a.

[4] This *per curiam* opinion is reported at 615 S.W.2d 176, and is reproduced in the Appendix at page 12a.

THE QUESTION IS SUBSTANTIAL

The question as to the constitutional permissibility of a state tax collector seizing personal property to satisfy an alleged tax delinquency without the opportunity for notice and hearing is a novel and substantial one. It has never before been treated by this Court.

I. In Contravention of the Fourth and Fourteenth Amendments, the Decision Below Deprives an Alleged Tax Delinquent the Opportunity for Notice and Hearing Before a Deprivation of Property Occurs.

At stake here is the right of a taxpayer to notice and hearing to contest the seizure of his property for back taxes. The court below mistakenly held that Article 7266, Texas Revised Civil Statutes,[5] is constitutional when examined in light of the Due Process Clause of the Fourteenth Amendment. The court's decision effectively placed in the hands of a state administrative official the power to unilaterally determine tax disputes without judicial supervision.[6]

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[5] This statute was repealed effective January 1, 1982. Although there has been a repeal, the court below treated the question on the merits since the tax collector is still in possession of the seized property and still threatens to sell it pursuant to this statute. No mootness question was raised in the opinion below, which decided the case on the merits, and it is clear that the question is not moot. Two cases decided by this Court last Term make it clear that the mere repeal of the statute without the cessation of the collector's claims will not render the issues moot. *Mills v. Habluetzel*, —— U.S. ——, ——, 102 S. Ct. 1549, 1552, 71 L. Ed. 2d 770, 775 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, —— U.S. ——, ——, 102 S. Ct. 1070, 1074, 71 L. Ed. 2d 152, 159 (1982). This Court also undertook to decide the constitutionality of a repealed statute and rejected the appellees' suggestion of mootness in *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981).

[6] There is no question here that the collector did not seek preseizure review of his actions; indeed, by taking matters into his own hands, he attempted to deprive the court which had already acquired jurisdiction over the tax dispute of any ability to review it at all.

This Court has previously defined the contours of due process when applied to the pre-judgment seizure of cases. *North Georgia Finishing Co. v. DiChem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The court below, after a brief examination of these cases held that procedural due process was satisfied by article 7266.

The difficulty with the decision below is that this Court has explicitly required notice and hearing as an integral requirement of procedural due process. Just as in *Fuentes v. Shevin*,

> The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings 'at a meaningful time.' . . . The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property . . . .

407 U.S. 67, 80 (1972) (emphasis in original). The requirement is clear: There must be a *prior* hearing.[7]

The only exception recognized to the requirement of a pre-seizure hearing was a vitally important governmental need requiring immediate action to protect the public. The cases cited by this Court in *Fuentes* included the urgent need for seizure of misbranded drugs, contaminated food, the assets of a failing bank and the collection of federal revenues. *Id.* at 91-92. Seizing upon this latter thought, the court below drew an improper analogy to article 7266 in an attempt to save it.

Without citing *Phillips v. Commissioner*, 283 U.S. 589 (1931), the court below relied upon it as authority for the proposition that a seizure of property is permissible

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[7] The Texas statute does not even provide for any sort of post-seizure review, unlike those involved and found constitutionally void in *Fuentes*.

so long as the reason is the collection of taxes. *Phillips* does not go so far as to give carte blanche to every seizure done in the name of tax collection.

The seizure in *Phillips* was specifically upheld because there was a clear statutory scheme for a post-seizure determination of tax liability. The burden of proof was on the Commissioner of Internal Revenue.[8] *Id.* at 598. The Court was also impressed by the fact that the taxpayer could have a remedy before payment of taxes, without the necessity of a bond. *Id.* at 598.

The currency of *Phillips* is open to question. Mr. Justice Powell, concurring in *North Georgia Finishing Co. v. DiChem, Inc.*, quoted from *Phillips* and then questioned its validity:

> But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.

419 U.S. 601, 610 (1975). This subtle criticism suggests that *Phillips* should be limited to its narrow facts and to the collection of federal taxes.

Beyond these difficulties, the statute here drawn into question does not represent "strict control" of the state's "legitimate force". *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972). The statute is anything but narrowly drawn,

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[8] The decision below, by suggesting in dicta that the appellants could have filed a suit for refund of any improperly collected amounts, has impermissibly shifted the burden of proof from the seizing party to the property owner. This is particularly the case since the collector is not in the first instance required to make any showing of even a minimal justification for a seizure. There can be no question that the thrust of this Court's opinion in *Fuentes* requires that the burden of proof be placed on the party seeking the deprivation of property. *Goldberg v. Kelly*, 397 U.S. 254 (1970) clearly stands for the notion that the risk of mistake is to be borne by the state. *Id.* at 265-67.

which is a clear prerequisite to constitutional validity. The statute does not "limit the summary seizure of goods to special situations demanding prompt action." *Id.* at 93. Indeed, no need for prompt action has been demonstrated by the collector, either on the record in this proceeding nor in the decisions below. Simply stated, "no such unusual situation is presented by the facts". *Id.* at 93.

II. The Decision Below Impermissibly Deprives a Taxpayer of His Property Without Due Process of Law, Even if a Refund Might Be Available.

The court below chose a simple answer to an important problem by suggesting that a taxpayer whose property is seized might obtain a refund of any improperly collected taxes.[9] Even if there could be a post-seizure suit for a refund of the taxes, this is no substitute for a prior hearing. *Sniadach*, *Fuentes*, and *North Georgia Finishing* all hold that pre-seizure review is fundamental; even in those narrow instances where a vital public need requires a hearing to be postponed until after the seizure at issue, a hearing nonetheless must be had. The statute now under examination admits of no hearing at all, either before or after seizure.[10]

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[9] The court cited as authority for its dicta four distinguishable cases. None have ever before been held to stand for the proposition that a suit may be maintained against a county tax collector to recover improperly collected taxes. Indeed, the court of civil appeals recognized that there is no procedure under Texas law to sue for a refund. 610 S.W.2d 533, 534. (App. 10a). None of the cases relied upon by the supreme court dealt with a seizure.

[10] In *Fuentes* this Court commented on the inequity of statutes which deprive a person of property rights without a prior adjudicative hearing, or at least an impartial review:

> Both *Sniadach* and *Bell* [*v. Burson*] involved taking of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes involved recovery provisions,

The difficulty with the court's refund approach—in addition to the fact that Texas law has not previously recognized a refund suit for personal property taxes—is that the burden of proof is improperly shifted to the owner of the property rather than upon those who seized it. *Cf. Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). The taxpayer, moreover, is deprived the use of his money during the period involved in prosecuting a refund suit, not to mention the unrecoverable expenses incident to litigation. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

Thus it is clear that a separate refund cannot serve as a substitute for pre-seizure notice and hearing. The Court has previously rejected such reasoning:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'

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allowing the defendants to post security to quickly regain the property taken from them. Yet the Court firmly held that these were deprivations of property that had to be preceded by a fair hearing.

Id. at 85. Unlike the statutes in those cases, the seizure provision here admits of absolutely no recovery of the property levied upon and seized, short of paying the disputed tax.

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972).[11] These observations are equally applicable to the refund suit solution posed by the court below: The principal distinction, however, is that a refund action involves both a deprivation for a greater period of time and considerably more expense in obtaining a recovery, thus leading to an even less complete remedy.

The court below also held that the present litigation serves as a suitable substitute for a pre-seizure hearing. (App. 5a). The fact that article 7273 provides for 10 days' notice prior to the sale of seized property does not provide due process to a taxpayer. The decision below has implied that this 10-day period should be used to institute a separate action for judicial review.[12] What the opinion does not discuss is that a taxpayer must within that brief period begin a legal challenge to the seizure

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[11] Any suggestion that *Fuentes* should be limited to consumer transactions involving private parties is surely undercut by *Goldberg v. Kelly*, 397 U.S. 254 (1970), which noted the importance of a prior hearing when applied to governmental benefits.

[12] The collector pressed forward with an argument which apparently seduced the court below. He pointed out that Phillips had begun just such a legal battle during the post-seizure pre-sale hiatus, and that this is all the judicial review to which it or any other taxpayer has a right to expect. The district court in the first instance denied the applications for both a temporary restraining order and a temporary injunction seeking to delay the sale. (App. 1a). Phillips then had to obtain, in an extraordinary proceeding, a temporary injunction from the court of civil appeals, the granting of which was conditioned on a bond. (App. 13a). There was then a plenary review of the trial court's action by the appeals court, and the subsequent application for writ of error in the Texas Supreme Court. The case was returned to the district court, resulting in a direct appeal to the state supreme court. Review by appeal in this Court is now being sought. This can hardly be viewed as pedestrian litigation of the routine sort, nor can it be regarded as inexpensive. Given the great difficulties involved and the attendant financial and time demands, it cannot be said in candor that this proceeding has constituted a viable alternative to pre-seizure review, particularly in cases where the amounts are small or the taxpayers unsophisticated. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 83 n.13 (1972).

and obtain an injunction to stay the scheduled sale. In such a short time frame only a temporary injunction could be obtained, and the granting of such an injunction is by no means certain. Indeed, the standard of review on appeal is whether the district court abused its discretion in refusing to grant a temporary injunction.

The opinion below further holds that due process is only necessary in the assessment of taxes and not in their collection. (App. 3a). Such a holding is both remarkable and unsupportable. The notice and hearing given in the assessment of taxes has absolutely nothing to do with their collection; even though the taxpayer might have no quarrel with the assessment, he might have a dispute as to the amount of taxes being claimed by the collector.

III. The Decision Below Misunderstands this Court's Holdings in *Sniadach*, *Fuentes* and *North Georgia Finishing* and, if Allowed to Stand, Would Encourage Other States to Engage in Summary Seizures Without an Opportunity for Notice and Hearing.

There is no doubt that a state tax collecting authority can generate revenues much more rapidly if it is not burdened with having to accord notice and hearing before summarily seizing a taxpayer's property. The collecting authority is also saved the expense and delays necessarily attendant with the holding of pre-seizure hearings, thereby conserving tax dollars. Taxpayers who have genuine concerns about the propriety of the taxes or the amounts claimed would be encouraged to pay up without voicing their reservations in order to avoid the inconvenience and public embarrassment of a seizure. Collections would thus undoubtedly improve and the gross dollars received by the tax collector naturally increase. In a tightening economy, where tax delinquencies tend to rise, a short-cut collection procedure becomes even more tempting. And where the collector is an elected official, his political appearance would be enhanced through his ability to point to an increase in tax collections.

But this corner-cutting would be constitutionally expensive. The due process requirement of notice and hearing would necessarily be eroded. There would be no opportunity for the hearing which this Court has recognized "must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). The decision of the court below therefore opens a Pandora's box which can only be sealed through a reversal.

In addition to *Fuentes*, this Court has decided two other cases having a direct impact on this appeal. *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In each of these opinions, no inquiry was ever made by the Court into the merits of the creditors' claims; the Court was apparently unconcerned whether the defendants whose property was summarily seized actually owed what the plaintiffs claimed. Implicit in each of these cases is that the end does not justify the means.

The decision below misinterprets these cases and implicitly holds that the trappings of due process are dispensable or at least optional with the administrative official when he is collecting taxes. This the court below holds to be true even where no emergency justifying quick action is shown. Since the end does not justify the means, the judgment of the lower court should be reversed.

CONCLUSION

For the important reasons set forth above, this Court should note probable jurisdiction to review the opinion and judgment of the court below.

Respectfully submitted,

LEONARD WAYNE SCOTT
Counsel of Record

GARY PINNELL
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Appellants

October 19, 1982

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APPENDIX

SUPREME COURT OF TEXAS

No. C-1069

BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Appellant,

v.

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.,
and DELMAR PHILLIPS,
Appellees.

May 12, 1982

As Amended on Denial of Rehearing
July 21, 1982

WALLACE, Justice.

This is a direct appeal from a judgment of the district court which held Article 7266[1] unconstitutional and granted a permanent injunction against sale of personal property seized by the County Tax Assessor-Collector pursuant to that statute. We reverse the judgment of the trial court and dissolve the permanent injunction enjoining the sale of personal property seized for delinquent taxes.

Ben B. Shaw, Tax Assessor-Collector of Bexar County (Shaw) filed suit against Phillips Crane & Rigging of San Antonio, Inc. and Delmar Phillips (Phillips) for delinquent ad valorem taxes for the years 1972 through 1979. While the suit was pending, Shaw levied upon and seized certain personal property owned by Phillips. Shaw proposed to sell this personalty in 20 days at a public

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[1] All references are to Tex. Rev. Civ. Stat. Ann. unless otherwise indicated. This statute was repealed effective January 1, 1982.

auction as allowed by Article 7266. Phillips instituted suit to enjoin sale of the property contending that Article 7266 is unconstitutional. The trial court denied the injunction by interlocutory judgment. That judgment was appealed to the court of appeals which granted a temporary injunction to protect its jurisdiction pending a hearing on the merits. This Court upheld the court of civil appeals' action granting a temporary injunction, but specifically withheld approval of their holding that Article 7266 was unconstitutional. *State v. Querner Tuck Lines, Inc.*, Tex., 615 S.W.2d 176. On appeal of the merits, the Phillips case was consolidated with that of another taxpayer whose property had also been seized. *Querner Truck Lines, Inc. v. State*, Tex. Civ. App., 607 S.W.2d 1. The consolidated cases were heard on the merits by the court of appeals which held the statute unconstitutional stating, "[N]o efficient and adequate remedy exists under Texas statutes for a taxpayer to contest either before or after seizure . . . ." 610 S.W.2d 533, 544. On remand the district court rendered judgment that the statute was unconstitutional and granted a permanent injunction against sale of the property. Shaw brought this direct appeal. The sole issue before us is whether Article 7266 is unconstitutional for lack of due process safeguards.

Phillips contends that Article 7266 does not meet the due process requirements of the United States Supreme Court as set out in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed 2d 349 (1969); and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed. 2d 751 (1975). The due process requirements for seizure of property enunciated by those cases are notice of and an opportunity to contest the seizure and sale. The exceptions to those requirements as set out in *Fuentes* are: (1) a necessity to secure an important governmental or general public interest; (2) a special need for prompt action; and (3) a strict control by the state over its monopoly of

legitimate force, i.e., seizure must be initiated by a governmental official who determines that it was necessary and justified in the particular instance.

We will first discuss whether sufficient notice and opportunity for a hearing is afforded by the taxation statutes which are found in Article 7145 through 7298.

A review of the above statutes reveals the following chronology of events which make up the process of rendition, assessment and a collection of ad valorem taxes. Each property owner is required to render his property, real and personal, with the County Tax Assessor not later than June 1, of each year. If the property owner fails or refuses to render his property it is the duty of the Assessor to render it for the owner. A list of all property in the county along with his evaluation is presented by the Assessor to the County Commissioner's Court, sitting as a Board of Equalization, not later than the first Monday in June, or as soon as practical thereafter. Upon approval of this property roll by the Board of Equalization, the tax roll is prepared by applying the authorized tax rate to the property roll. The tax roll is filed with the County Clerk and is available for inspection by the public. This filing with the County Clerk is required to be made no later than October 1. The taxes as indicated on the roll become due on January 1, of the following year. Any increase in the valuation of a taxpayer's property, above that for which he renders it, can only be made by the Board of Equalization after ten days notice of such meeting.

A taxpayer who renders his property as required by law is thus assured that it will be assessed at that value or he will have ten days notice to appear before the Board of Equalization to contest any increase. The taxpayer is thus on constructive notice no later than October 1, of each year, of the exact amount of his taxes due.

Only by following the above procedure is there a legal tax assessed against any taxpayer. Therefore, the stat-

utes provide due process to a taxpayer in the assessment of taxes against his property.

Phillips contends that its due process rights were violated in the seizure of its personal property for payment of the taxes.

If a taxpayer fails to pay his taxes by February 1,[2] of the year following assessment they become delinquent, and the Assessor-Collector may seize property of the taxpayer's sufficient to cover the outstanding taxes. The Collector must hold the property for ten days after seizure and then may sell the seiz[illegible]roperty at public auction. The tax statutes do not provide for a special hearing either before or after the seizure for the taxpayer to contest any possible mechanical or mathematical error made by the Assessor in calculating the amount shown on the delinquent tax rolls. It is this lack of notice and hearing which Phillips contends deprives a taxpayer of due process.

Shaw contends that a taxpayer is also afforded due process because the taxpayer can pay the tax under protest and then sue for recovery. Phillips contends that this is not available inasmuch as special consent of the Legislature is necessary to sue the State for such taxes. We reject Phillips' contention. As stated above, any increase in delinquent taxes shown by the Assessor due to a mathematical miscalculation would not be a legal tax and consent of the Legislature is not required in order to sue the County Tax Assessor-Collector for recovery of an illegal tax involuntarily paid under duress. *Crow v. City of Corpus Christi*, 146 Tex. 558, 209 S.W.2d 922 (1948); *Austin National Bank v. Sheppard*, 123 Tex. 272, 71 S.W.2d 242 (1934); *The Galveston Gas Company v. County of Galveston*, 54 Tex. 287 (1881); *see also, State v. Lain*, 162 Tex. 549, 349 S.W.2d 579 (1961).

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[2] Under the new Tax Code Ann. Sec. 31.02 (1981), taxes are now expressly delinquent as of February 1.

So long as there exists between the taxpayer and the Tax Assessor-Collector a legitimate controversy over the amount of the taxes the taxpayer may bring a suit for declaratory judgment to determine the accuracy of the tax computations and thus the legality of the taxes. Also, the taxpayer may bring a suit to enjoin the collection of the alleged illegal taxes pending a hearing on the legality of same. We hold these remedies meet the due process requirements in the seizure and sale of property as set out in *Fuentes*, *Sniadach*, and *North Georgia Finishing Co., Inc.*

A further reason for holding Article 7266 constitutional is that collection of ad valorem taxes by the County Tax Assessor-Collector falls within the exceptions enunciated by the United States Supreme Court in that the timely and efficient collection of ad valorem taxes secures an important governmental function; there is a special need for taxes to be paid when due in order that the County Commissioner's Court may meet the financial obligations of the county; and the seizure and sale of property to pay delinquent ad valorem taxes are under the control of a governmental officer, to-wit the County Tax Assessor-Collector, who makes the determination of the necessity and justification of seizure in a particular instance.

The judgment of the trial court is reversed and the injunction against sale of the property in question by the Bexar County Tax Assessor-Collector is dissolved.

SUPREME COURT OF TEXAS

No. C-1069

BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Appellant,

vs.

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.
and DELMAR PHILLIPS,
Appellees.

DIRECT APPEAL

This cause was heard on direct appeal from the 224th District Court of Bexar County, Texas. The original record, briefs and arguments of Counsel were considered.

It is the opinion of the Court there was error in the judgment of the trial court which held Article 7266 unconstitutional and granted a permanent injunction against sale of personal property seized by the County Tax Assessor-Collector.

It is ordered that:

1) the judgment of the trial court is reversed and,
2) the permanent injunction enjoining the sale of personal property seized for delinquent taxes is dissolved.
3) Phillips Crane & Rigging of San Antonio, Inc. and Delmar Phillips shall pay the costs in this Court and the trial court.
4) Ben B. Shaw, individually and as Tax Assessor-Collector of Bexar County, Texas shall recover the costs he incurred in said courts.

A copy of this judgment with a copy of the opinion shall be certified to the District Court of Bexar County, Texas for observance.

(Opinion of the Court by Justice Wallace)

SUPREME COURT OF TEXAS

No. C-1069

BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Appellant,

vs.

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.
and DELMAR PHILLIPS,
Appellees.

July 21, 1982

DIRECT APPEAL

Motion for rehearing on behalf of appellees Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips, filed on May 27, 1982, in the above numbered and entitled cause, having been duly considered, it is ordered that the said motion be and hereby is overruled.

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

Nos. 16605, 16606

QUERNER TRUCK LINES, INC.,
PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.
and DELMAR PHILLIPS,
Appellants,

v.

THE STATE OF TEXAS, COUNTY OF BEXAR,
and BEN B. SHAW,
Appellees.

Nov. 19, 1980

Rehearing Denied Dec. 31, 1980

OPINION

MURRAY, Justice.

This is an interlocutory appeal taken from an order of the 37th District Court of Bexar County, Texas, denying the appellants' application for temporary injunction. The appellants sought to restrain a threatened tax sale of their property which had been levied upon and seized by Ben B. Shaw, Tax Assessor-Collector of Bexar County, to collect personal property taxes allegedly due Bexar County and other taxing authorities. Prior to the seizure the tax assessor-collector had instituted suits against appellants for the collection of these taxes and the suits are still pending. The amount of taxes claimed by the collector to be owed by Phillips is $12,920.42 for the years 1972 through 1979, and for Querner, $17,642.98 for the years 1960 through 1979.

The district court denied the temporary injunction and both appellants have perfected their appeal from such order to this court. After hearing arguments, this court

granted the request for temporary injunctions pending the determination of the merits of this appeal.

The tax assessor-collector has seized appellants' property by authority of Article 7266 of the Texas Revised Civil Statutes, which provides in part as follows:

> if any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the Comptroller, the tax collector shall, by virtue of his tax roll, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon.

Tex. Rev. Civ. Stat. Ann. art. 7266 (Vernon 1960). Appellants contend that this statute is unconstitutional because it operates to effect a deprivation of property without due process of law. We agree.

This suit is an action to restrain the tax collector from performing certain functions prescribed by an invalid legislative enactment. Whether appellants are entitled to the relief sought in the lower court rests solely on the validity of Article 7266. If it is valid, then it necessarily follows that the temporary injunction was rightfully denied by the trial court, for the official representatives of the state cannot be restrained from the performance of a duty placed upon them by valid statutory enactment.

Section 686 of 84 C.J.S. 1365 *Taxation*, states:

> Laws providing summary remedies for the collection of delinquent taxes are not open to constitutional objection because they dispense with some of the formalities of ordinary judicial procedure, or cut off technical defenses, or authorize the seizure of property first and a hearing afterward, provided the taxpayer is given an opportunity, at some stage of the proceedings and before his rights are finally cut off, to con-

> test the validity of the tax or his liability with respect to it; but a statute directly in conflict with a constitutional provision is void.

84 C.J.S. 1365 *Taxation* § 386 (1954).

States' statutes providing for summary remedies for the collection of taxes have been upheld as constitutional where they provide an opportunity either before or after the seizure for the taxpayer to contest the validity of the tax or his liability with respect to it. Some of these states are: Florida (F.S.A. § 199.341); New York (Tax Law § 1139); Louisiana (L.R.S. 47:2108); California (West Annotated Revenue and Taxation Code § 4512); Ohio (Ohio Revised Code § 2723.01 and § 5703.052); and many others. With the exceptions of the State of Texas, we have been unable to find any state statute which fails to provide a method for refund after seizure and sale.

Under Article 7266, the tax assessor-collector determines who is delinquent and collects the taxes by seizing their property and selling it. The taxpayer must then obtain legislative permission to sue the State before he may claim a refund. *Director of the Department of Agriculture and Environment v. Printing Industries Association of Texas*, 600 S.W.2d 264 (Tex. 1980); *Oxford v. Hill*, 558 S.W.2d 557 (Tex. Civ. App. —— Austin 1977, writ ref'd); *Hopper v. Midland County*, 500 S.W.2d 552 (Tex. Civ. App. —— El Paso 1973, writ ref'd n.r.e.). The Supreme Court of Texas in *Griffin v. Hawn*, 161 Tex. 442, 341 S.W.2d 151 (1960), stated, "Where the purpose of a proceeding against state officials to control action of the State or subject it to liability, the suit is against the State and cannot be maintained without the consent of the Legislature." 341 S.W.2d at 152. The right of the taxpayer to a refund of money seized by the tax collector under Article 7266 would depend on his ability to persuade the legislature to give permission to sue.

No efficient and adequate remedy exists under Texas statutes for a taxpayer to contest, either before or after the seizure, and Article 7266 is therefore unconstitutional. *See, Phillips v. Commissioner*, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (summary seizure by Internal Revenue Service).

The judgment of the trial court is reversed with instruction to enter a temporary injunction pending a trial on the merits.

SUPREME COURT OF TEXAS

No. C-126

STATE OF TEXAS, *et al.*,
Petitioners,

v.

QUERNER TRUCK LINES, INC., *et al.*,
Respondents.

March 18, 1981

PER CURIAM.

This case involves an interlocutory appeal taken from an order of the district court which denied an application for temporary injunction. The tax collector of Bexar County had seized and had threatened to sell certain personal property in order to collect personal property taxes the respondent taxpayers allegedly owed the County and other taxing authorities. The taxpayers sought to enjoin that impending sale. The district court denied the application for temporary injunction. The court of civil appeals reversed the judgment of the district court and remanded the cause to that court with instructions to render a temporary injunction pending trial on the merits. 610 S.W.2d 533.

We agree with the judgment of the court of civil appeals which preserves the subject matter of this cause pending trial on the merits. *Anderson v. Tall Timbers Corporation*, 162 Tex. 450, 347 S.W.2d 592 (1961). However, our refusal to grant this application for writ of error is not to be taken as approving the holding of the court of civil appeals that Article 7266, Texas Revised Civil Statutes Annotated, is unconstitutional. We reserve that question for future determination. The application for writ of error is refused, no reversible error.

COURT OF CIVIL APPEALS OF TEXAS
SAN ANTONIO

Nos. 16579, 16581

QUERNER TRUCK LINES, INC.,
Petitioner,
v.
STATE OF TEXAS,
Respondents.

PHILLIPS CRANE & RIGGING OF
SAN ANTONIO, INC., *et al.*,
Petitioners,
v.
BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Respondents.

June 23, 1980

CADENA, Chief Justice.

Petitioners in these cases filed suits in the district court of Bexar County, Texas, seeking to enjoin the sale by respondent, Ben B. Shaw, of personal property of petitioners to satisfy a claim for delinquent taxes.

On June 3, 1980, Ben B. Shaw, in his capacity as tax collector, levied upon and took possession of personal property belonging to petitioner Querner Truck Lines, Inc. On the same day Shaw took similar action concerning personal property of petitioners, Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips. Respondent Shaw acted in the exercise of the authority vested in him by the provisions of Tex. Rev. Civ. Stat. Ann. art. 7266 (Vernon 1960), which authorizes the summary seizure and sale of personal property on which delinquent taxes are owing.

Subsequently, Shaw posted notice of sale of the seized properties to be held on June 24, 1980.

Querner filed suit seeking declaratory relief and an injunction prohibiting Shaw from holding the proposed sale on June 24, 1980. A similar suit was filed by Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips. The two cases were consolidated for the purpose of a hearing on the applications for injunctive relief, and on June 19, 1980, the trial court entered orders denying the applications of all petitioners for temporary injunction. Petitioners have timely filed appeal bonds.

By the proceedings filed in this court petitioners seek an order enjoining the sale of their property, scheduled to take place on June 24, 1980, pending determination on the merits of their appeals from the order of the trial court denying their prayers for temporary injunctions.

Respondents admit that if the sale takes place on June 24, 1980, the appeals from the orders denying temporary injunctive relief will become moot and would require a dismissal of such appeals. This means that unless the sale is prevented our jurisdiction to hear the appeals will be destroyed, since any opinion we might deliver concerning the propriety of the denial of such relief would be meaningless.

Under Tex. Rev. Civ. Stat. Ann. art. 1823 (Vernon 1964), this court may issue all writs necessary to protect its jurisdiction. The power to take such action in response to an original proceeding filed in this court cannot be doubted. *See Riverdrive Mall, Inc. v. Larwin Mortgage Investors*, 515 S.W.2d 2 (Tex. Civ. App. — San Antonio 1974, writ ref'd n.r.e), where this court enjoined a sale under a deed of trust in order to protect our jurisdiction and preserve the subject matter of the appeal so that whatever decree we might enter in connection with the appeal from the trial court's refusal to temporarily enjoin the sale might be effective.

In the brief filed in opposition to petitioners' applications for injunctive relief from this court, respondents assert that the trial court correctly refused to grant injunctive relief because the grounds urged by petitioners in the trial court as supporting such relief are without merit. Such proposition requires that we, at this time, decide the merits of the appeal. We decline to do so in this case without deciding whether such consideration of the merits of an appeal would be proper in any case.

Respondent, Ben B. Shaw, is enjoined from conducting the sale of the personal property of petitioners levied upon and seized by Ben B. Shaw on June 3, 1980, pending final determination by this court of the propriety of the action of the trial court in denying the temporary injunctions sought by petitioners; provided that petitioners filed with our Clerk, no later than 10:00 a.m. June 24, 1980, bonds meeting the following requirements:

The bond to be filed by petitioner, Querner Truck Lines, Inc., shall be in the amount of $18,000.00, with good and sufficient sureties, approved by the District Clerk of Bexar County, Texas, conditioned that Querner Truck Lines, Inc., will pay to the State of Texas, Bexar County and Ben B. Shaw all damages to such respondents in the event this court shall determine that the temporary injunction was properly denied by the trial court.

The bond to be filed by petitioners, Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips, shall be in the amount of $13,500.00, with good and sufficient sureties, to be approved by the District Clerk of Bexar County, Texas, conditioned that Phillips Crane & Rigging of San Antonio, Inc., shall pay to respondent, Ben B. Shaw, Tax Collector-Assessor of Bexar County, Texas, all damages in the event this court shall finally determine that the temporary injunction sought by these two petitioners was properly denied by the trial court.

IN THE DISTRICT COURT
224TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

No. 80-CI-8970-A

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS, formerly doing business as PHILLIPS ERECTION COMPANY

vs.

BEN B. SHAW, Individually and as Tax Assessor-Collector of Bexar County, Texas

JUDGMENT GRANTING PERMANENT INJUNCTION

BE IT REMEMBERED that on this 19th day of November, 1981, came on to be heard in the above styled and numbered cause for trial on the merits of the first and second counts of the Plaintiffs' Petition, relating to the actions for declaratory and injunctive relief. The said causes of action were severed from the third and fourth counts contained in the Plaintiffs' Petition by an Order previously entered by this Court. The parties appeared by and through their attorneys of record and announced ready for trial. The parties further announced that they had reached a stipulation as to the facts of the case, and the parties submitted a written stipulation which was duly certified by the Court and considered pursuant to Rule 263, Texas Rules of Civil Procedure.

After considering the agreed facts, and hearing the argument of counsel, the Court is of the opinion that Article 7266 of the Texas Revised Civil Statutes, is unconstitutional, and that the injunctive relief requested by the Plaintiffs should be granted. Accordingly, it is

ORDERED, ADJUDGED, DECREED and DECLARED, that Article 7266 of the Texas Revised Civil Statutes is unconstitutional; and it is further

ORDERED, ADJUDGED and DECREED that the Temporary Injunction herein granted be made perpetual, and that the Defendants, BEN B. SHAW, his agents, employees, and attorneys, and all those in active concert or participation with him, and his successors in office as Tax Assessor-Collector of Bexar County, Texas, be and hereby are permanently restrained and enjoined from any sale of the corporate Plaintiff's property for the collection of any taxes alleged to be due for the years 1972 to 1979, assessed in the name of either Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the principal and sureties on Plaintiffs' bond for Temporary Injunction herein should be and are hereby relieved and discharged from further liability on such bond upon this judgment becoming final.

SIGNED AND ORDERED ENTERED this 19th day of November, 1981.

/s/ James C. Onion
Judge presiding

IN THE DISTRICT COURT
224TH JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

No. 80-CI-8970

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS, formerly doing business as PHILLIPS ERECTION COMPANY

vs.

BEN B. SHAW, Individually and as Tax Assessor-Collector of Bexar County, Texas

STIPULATION OF COUNSEL

It is agreed and stipulated by and between counsel for Plaintiffs and counsel for Defendants as follows:

1. Phillips Crane & Rigging of San Antonio, Inc., is a corporation duly organized and existing under the laws of the State of Texas, with its principal place of business in Bexar County, Texas.

2. Delmar Phillips is an individual and formerly did business in Bexar County, Texas, as Phillips Erection Company.

3. Ben B. Shaw is the duly elected, qualified and acting Tax Assessor-Collector of Bexar County, Texas.

4. Because the validity of state statutes is involved in this preceding, service of process was had upon Mark White, Attorney General of the State of Texas, but no answer on behalf of the Attorney General or the State of Texas has been had in this cause.

5. On June 3, 1980, Ben B. Shaw levied upon, seized and took into possession certain property belonging to the corporate plaintiff.

6. True and correct copies of the Notices of Levy signed by the defendant are attached to the Plaintiff's petition as Exhibit A.

7. On June 4, 1980, the defendant posted a Notice of Tax Sale proclaiming that the assets of the corporate plaintiff which had been levied upon, seized and taken into possession by the defendant would be sold on June 24, 1980. A true and correct copy of this Notice of Tax Sale is attached to the Plaintiff's petition as Exhibit B.

8. According to the Notices of Levy, such levy was made for the allegedly delinquent taxes claim by the defendant to be owed for the years 1972 through 1979 and assessed under the name of the corporate plaintiff or the individual plaintiff.

9. On February 19, 1976, a suit was filed by the City of San Antonio, Texas, in the 166th District Court of Bexar County, Texas, Docket No. 76-TA2-42, against the corporate plaintiff alleging that certain personal property taxes were due and owing to the City of San Antonio and seeking to collect these allegedly due and delinquent taxes. Thereafter, the State of Texas and the County of Bexar intervened in the said suit, seeking to collect personal property taxes for the years 1972 forward.

10. This suit described in the previous paragraph is still pending, and was pending at the time of the defendant's seizure of property belonging to the corporate plaintiff.

11. The taxes being sought by the Notices of Levy and the taxes upon which there is the above-described tax suit are the same taxes, and the defendant is seeking identical results in both seizure proceedings and the law suit.

12. The fair market value of the personal property levied upon, seized and taken into possession by the defendant is far in excess of the taxes claimed to be due

and owing by the defendant as taxes, penalty and interest.

13. The testimony and exhibits presented and adduced at the hearing upon Plaintiff's Application for Temporary Injunction which was conducted on the 17th day of June 1980 before the Honorable Richard J. Woods shall be admitted into evidence upon the trial on the merits in the above entitled and numbered cause, and that such testimony which was subsequently reduced to writing by Joanne G. Price, Official Court Reporter, shall be and constitutes the Statement of Facts upon the trial of the merits, subject to the following additional stipulations.

14. It is further agreed and stipulated by and between the counsel for Plaintiff's and counsel for Defendants that unless enjoined from so doing, Defendant, Ben B. Shaw, Tax Assessor-Collector of Bexar County, Texas, will proceed with the seizure and sale of those items of personal property described in Plaintiff's Original Petition, which items have a fair market value substantially in excess of the amount claimed by Defendants to be due and owing as taxes, penalty, and interest.

15. The plaintiffs and the defendants disagree as to whether Article 7266, Texas Revised Civil Statutes is unconstitutional.

16. It is further agreed that, if Article 7266 is unconstitutional, the plaintiffs will suffer immediate irreparable loss, injury or harm for which there is no adequate remedy at law if the defendant is not permanently enjoined from proceeding with a tax sale.

17. This case shall be submitted to the court upon this agreed stipulation of facts, upon which judgment should be rendered, and this statement signed and certified by the court to be correct and the judgment rendered by the court thereon shall constitute the record of this cause.

Executed this 13th day of November, 1981.

(Signatures of counsel omitted in printing)

CERTIFICATION OF COURT

ON THIS DATE the court considered the above stipulation of counsel which has been filed with the clerk and after considering the same, finds that the stipulations should be approved in all things and that this case should be determined as an agreed statement of facts pursuant to Rule 263, Texas Rules of Civil Procedure.

Signed this 19th day of November, 1981.

/s/ James C. Onion
Judge Presiding

Filed: July 26, 1982

IN THE SUPREME COURT OF TEXAS

No. C-1069

BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Appellant,

vs.

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.,
and DELMAR PHILLIPS, formerly doing business as
PHILLIPS ERECTION COMPANY,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips, formerly doing business as Phillips Erection Company, the appellees in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Texas which became final on July 21, 1982, holding that Article 7266, Texas Revised Civil Statutes, is not unconstitutionally repugnant to the Fourteenth Amendment to the Constitution of the United States, and reversing the trial court's judgment of unconstitutionality and vacating the permanent injunction entered in favor of Phillips.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Gary Pinnell
GARY PINNELL

(Proof of Service omitted in printing)

Filed: Oct. 15, 1982

IN THE SUPREME COURT OF TEXAS

No. C-1069

BEN B. SHAW, Individually and as
Tax Assessor-Collector of Bexar County, Texas,
Appellant,

VS.

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC.,
and DELMAR PHILLIPS, formerly doing business as
PHILLIPS ERECTION COMPANY,
Appellees.

SUPPLEMENTAL
NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips, formerly doing business as Phillips Erection Company, the appellees in the above styled and numbered cause, hereby appeal to the Supreme Court of the United States from the judgment of the Supreme Court of Texas which became final on July 21, 1982, holding that Article 7266, Texas Revised Civil Statutes, is not unconstitutionally repugnant to the Fourteenth Amendment to the Constitution of the United States, and which reversed the trial court's judgment of unconstitutionality and vacated the permanent injunction entered in favor of Phillips.

Notice is further given that, because subsequent to the judgment of the Supreme Court of Texas, Ben B. Shaw resigned as Tax Assessor-Collector of Bexar County, Texas, Rudy Garzia, his successor in office, is being joined as an additional party pursuant to Rule 40.3 of the Rules of the Supreme Court of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ Gary Pinnell
GARY PINNELL

(Proof of Service omitted in printing)

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-677

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

* * *

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,

Appellants,

V.

BEN B. SHAW AND RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

Appellees.

* * *

On Appeal from the Supreme Court of Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
(512) 477-9412
Counsel of Record

OLIVER S. HEARD, JR.
1019 Tower Life Building
San Antonio, Texas 78205
(512) 225-6763
Counsel for Appellees

January 6, 1983

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NO. 82-677

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

* * *

PHILLIPS CRANE & RIGGING
OF SAN ANTONIO, INC.,
and DELMAR PHILLIPS,

Appellants,

V.

BEN B. SHAW AND RUDY GARZA, as
Tax Assessor-Collector of Bexar County, Texas,

Appellees.

* * *

On Appeal from the Supreme Court of Texas

* * *

MOTION TO DISMISS OR AFFIRM

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees respectfully submit this their Motion To Dismiss the Appeal in the above-entitled and numbered cause, or, in the alternative, to affirm the Judgment below and in support of which show:

I.

The Appeal should be dismissed because no substantial federal question is presented.

II.

The Judgment should be affirmed because any federal question presented is so manifestly unsubstantial as to not warrant further argument.

This Appeal superficially presents mixed questions of federal and state law. It is Appellants' position, as Appellees understand it, that the Texas statutes authorizing seizure and sale of personal prcperty for the satisfaction of delinquent ad valorem taxes are repugnant to the Federal Constitution because Texas law fails to provide adequate judicial review. Thus, the threshold inquiry must be an examination of the review provided by Texas law. The secondary question is whether such procedures are adequate under the Texas Constitution.

I. Texas Law Provides Ample Remedies For Contest and Review of Tax Seizures.

The Opinion of The Supreme Court of Texas accurately describes the abundance of remedies afforded to an aggrieved taxpayer before, during and after the process of seizure and sale of property.

As the Court points out, a Texas taxpayer is under a duty to render his property, at a value set by the taxpayer, on June 1 of each year. Only upon the taxpayer's failure or refusal to render his property is the County Tax Assessor authorized to render the property for the taxpayer. In either event, the taxpayer is entitled to ten days notice and the right to

contest the valuation before the Board of Equalization. A taxpayer who is dissatisfied with the action of the Board of Equalization has recourse to judicial review in the Courts of Texas. *Carrol v. Lee*, 451 S.W. 2d 766 (Tex. Civ. App. — Texarkana, 1970, ref. n.r.e.); *Atlantic Richfield Co. v. Warren Independent School District*, 453 S.W. 2d 1980, ref. n.r.e.

Even a taxpayer who fails to render his property as required by law, fails to avail himself or herself of the administrative remedies before the Board of Equalization, fails to pursue judicial review of the valuation of his property or the tax rate, and fails to pay his taxes when due, may test the legality of the seizure during the actual process of seizure and sale. *Texas Revised Civil Statutes* Article 7273 (1960) provides that the Collector must wait at least ten days prior to disposing of any property seized pursuant to *Texas Revised Civil Statutes Annotated* Article 7266 (1960). The Supreme Court of Texas correctly points out this affords the taxpayer the right, under Texas law, to bring a suit for declaratory judgment to determine the legality of the taxes and to enjoin the collection pending judicial determination of the taxpayer's contentions.

The procedural history of the case at bar is a vivid illustration of the adequate, if not exhaustive, judicial review accorded to a Texas taxpayer by local law. This case has now been considered by three District Courts (the basic trial Court of Texas), twice considered by the intermediate appellate court and twice considered by the Supreme Court of Texas. During all of this protracted litigation the taxpayer has totally failed to bring forward any theory, let alone any evi-

dence, concerning the inaccuracy or illegality of the tax. Still, through all of this litigation, the Tax Collector has been prohibited from disposing of the property *due to the safeguards afforded by the law of Texas.*

Finally, as the Supreme Court of Texas points out, a taxpayer who also fails to contest the seizure during the process, may come in after the fact with a suit for a refund.

The Appellant and Amicus Curiae appear to be taking the astonishing position that the Supreme Court of Texas is in error on this point. (Jurisdictional Statement Pg. 9, Brief For Amicus Curiae Pg. 3.) It is respectfully submitted that the Supreme Court of Texas is the final authority on the local law of Texas, and if the Supreme Court has so declared the law, that is dispositive of the matter.

Thus, as declared by the Supreme Court of Texas, a Texas taxpayer is afforded administrative and judicial remedies before, during and after the process of seizure and sale.

II. The Texas Remedies Are Adequate Under The Federal Constitution.

It is Appellants' position, as Appellees understand it, that although Texas law affords administrative and judicial remedies before the Board of Equalization and the Courts, the right to a declaratory judgment and injunction during the process of seizure and sale, and a post seizure suit for refund, Texas law is constitutionally defective because it does not pro-

vide yet one more hearing immediately *prior* to seizure. This position has been expressly rejected by this Court. *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The collection of revenues is an important governmental function directly under the control of a governmental officer. As the Supreme Court of Texas points out there is a special need for taxes to be paid when due in order that the County Commissioner's Court may meet the financial obligations of the county. This Court has recognized this special need in connection with the collection of federal revenues.

Moreover, the Texas seizure and sale statutes apply only to *personal property* which is notoriously movable. This is a further illustration of the special need for seizure and sale statutes, particularly when ample and adequate contest and review procedures are available.

CONCLUSION

For the reasons set forth above, Appellees pray that this Court enter its Order Dismissing this Appeal, or in the alternative, that the Judgment of the Supreme Court of Texas be affirmed.

Respectfully submitted,

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
(512) 477-9412
Counsel of Record

OLIVER S. HEARD, JR.
1019 Tower Life Building
San Antonio, Texas 78205
(512) 225-6763

By: Thomas Goggan
THOMAS GOGGAN

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion To Dismiss or Affirm was this 6th day of January, 1983, forwarded to Mr. Gary Pinnell and Mr. Leonard Wayne Scott, Counsel for Appellants, and to Mr. Lawrence A. Haddad and Mr. Thomas M. Thurmond, Counsel for Amicus Curiae to their appropriate addresses.

Thomas Goggan

THOMAS GOGGAN

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

No. 82-677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC., and DELMAR PHILLIPS,
Appellants,

v.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas
Appellees.

On Appeal from the Supreme Court of Texas

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

LEONARD WAYNE SCOTT
Counsel of Record
GARY PINNELL
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Appellants

January 13, 1983

TOSH PRINTING CO., AC (512) 821-6911, SAN ANTONIO, TX. 78217

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IN THE

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NO. 82-677

PHILLIPS CRANE & RIGGING OF SAN ANTONIO, INC. and DELMAR PHILLIPS,

Appellants,

VS.

BEN B. SHAW and RUDY GARZA, as Tax Assessor-Collector of Bexar County, Texas,

Appellees.

On Appeal from the Supreme Court of Texas

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

None of the reasons advanced in the appellees' Motion to Dismiss or Affirm are persuasive enough for this Court to decline review of the decision below. The appeal presents a novel and substantial federal question which requires resolution by this Court.

A. By Suggesting That a Refund Suit is Available to a Taxpayer Whose Property Has Been Wrongfully Seized and Sold, the Court Below Improperly Placed the Burden on the Taxpayer to Prove the Impropriety of the Administrative Action.

The court below held the seizure statute constitutional for a variety of reasons, none of which are expressed with particularly great clarity. Although the court recognized that the involved "tax statutes do not provide for a special hearing either before or after the seizure for the taxpayer to contest" the propriety of the seizure or the correctness of the amount claimed, it nonetheless held that due process was not offended. The court's rationale was based on the supposed availability of a refund suit, the ability to bring a suit for a declaratory judgment and the taxpayer's remedy of injunction "to enjoin the collection of the alleged illegal taxes pending a hearing on the legality of same." [J.S. App. 4a-5a] Each of these reasons both begs the question and places on the property owner the responsibility to show the incorrectness of the seizure.

The flaw in the reasoning of the decision below is that in each of these approaches the taxpayer must demonstrate that the seizure should not have occurred, either because the tax is illegal or because of an administrative error on the part of the collector. In the context of an IRS seizure made pursuant to a jeopardy assessment, this Court has held that the burden of proving the propriety of the seizure must be on the taxing authority:

> [T]o permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury. This Court has recently and repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made. Here the Government seized the

> respondent's property and contends that it has absolutely no obligation to prove that the seizure has any basis in fact no matter how severe or irreparable the injury to the taxpayer and no matter how inadequate his eventual remedy in the Tax Court.

Commissioner v. Shapiro, 424 U.S. 614, 629-30 (1976) (footnotes omitted). The collector has also taken the position that he is not required to answer for his actions, and the opinion below would support that position.

After analyzing the language in *Phillips v. Commissioner*, which sustained the validity of the IRS seizure statute where "the opportunity given for the ultimate judicial determination of the liability is adequate",[1] the Court characterized this language as "carefully expressed" dicta. Mr. Justice White, writing for the Court, noted that

> neither the holding nor the dicta in *Phillips* support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor. Instead it would appear to be entirely consistent with our more recent holdings.

Id. at 632.[2] Some kind of "'probable cause'" must be shown justifying the seizure. *Id.* at 633, *quoting North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975).

In the case now at bar there is no statutory provision for the collector to show any sort of reasonable justification for his actions. Indeed, the collector has not demonstrated why a summary seizure was either necessary or justified.

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[1] 283 U.S. 589, 597 (1931).

[2] These "more recent holdings" include *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Although Texas law provides for a seizure where a tax deliquent is about to remove its property from the county,[3] no showing has been made that either Phillips or Querner were about to remove their assets from the county, that they were insolvent, or that any other extraordinary reason existed necessitating the rash action of a seizure.[4] The pendency of tax suits made the collector's actions all the more suspect because it became clear that he did not wish to justify his tax claims before a neutral court.

In addition to making no requirement that the collector explain his actions, the statutory scheme now under review contains no provision for a return of property wrongfully taken nor for a refund of taxes improperly collected.[5] Both

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[3] TEX. REV. CIV. STAT. ANN. art 7268 (Vernon 1960). This statute, also repealed as part of the complete revision of the state's property tax provisions, is now embodied in TEX. TAX CODE ANN. § 33.22(c)(2) (Vernon 1981).

[4] Both taxpayers are still in business at the same locations at which they were operating the time their property was taken. The suggestion made in the Motion to Dismiss or Affirm at 5 that quick action is justified by the inherently movable nature of personal property is simply an afterthought belatedly advanced to justify an unwarrented seizure.

[5] Even if a refund action could be implied, as the collector has argued, it would be less than adequate because of the fact that interest would not be recoverable from the state. This Court, in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981), held that the failure of a state to provide for interest on subsequently-refunded tax overpayments did not give rise to an exception to the Tax Injunction Act. This Court did not hold that the failure to provide interest did not render a state court remedy inadequate, nor did it decide that the non-payment of interest would not amount to a taking without just compensation. *Rosewell*, rather, was decided on procedural grounds. *Id.* at 512. But given this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a very strong case could be made that failure to provide interest is a constitutional deficiency of the allegedly available refund scheme which would render a refund action inadequate.

the appellees and the decision of the court below note that the collector "must hold the property for ten days after seizure" before selling it at public auction and suggest that during this period the taxpayer should mount his legal attack. [J.S. App. 4a] The difficulty with this approach is that the burden of proof is shifted to the taxpayer to show that the collector impermissibly deprived him of his property, rather than placing the burden on the collector to show that there was some "basis for his claim." *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976). All of this Court's "more recent holdings" very clearly place this burden on the party seeking the deprivation, where it ought to be. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 606 (1974) (immediate post-seizure hearing provided where seizure would be invalidated unless creditor could prove a basis for the deprivation. In the context of federal tax seizure statutes, it has been observed that "the governing due process principle obliges the IRS to provide a prompt hearing at which the IRS must prove 'at least probable cause' for its claim." *Laing v. United States*, 423 U.S. 161, 187 (1976) (Mr. Justice BRENNAN, concurring).

The taxpayer would also be required to shoulder the burden of proof under either of the other alternatives proposed by the court below. It is clear that even if a refund suit can be maintained* the burden must be shouldered by the taxpayer who has lost his property. Moreover, the seeking of an injunction requires that a particularly difficult burden be placed on the taxpayer since he must show both irreparable injury and inadequacy of a remedy at law. Placing these burdens on the party whose property is seized

* One of the issues in this case is whether, under Texas law, a suit for a refund of personal property taxes improperly assessed and collected may be had without legislative permission. Prior to the court's dicta in the opinion below no Texas case recognized the availability of a refund suit absent legislative permission. It is undisputed, however, that there is no statute authorizing such an action.

through governmental action is not the intention of this Court. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 80, 85 (1972) (rejecting notion that due process is satisfied where the property owner could institute post-seizure suit to review propriety of deprivation).

But perhaps more significant than what the opinion under review says is what it fails to consider. The court below seems to presuppose that a taxpayer whose property has been seized is in a position to pay the disputed taxes under protest and then afford to begin the long legal battle to recover those taxes. Implicit in this view is that mere money is involved, not something critical to the livelihood of the taxpayer.

Many of the arguments advanced by the appellees have already been answered by this Court in another, but analogous, context. In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), this Court required due process prior to the termination of utility service. Just as here, the governmental entity argued that "the available common-law remedies of a pre-termination injunction, a post-termination suit for damages, and a post-payment action for a refund are sufficient to cure any perceived inadequacy in" the utility's procedures. *Id.* at 19. The Court rejected this reasoning on the basis of its previous holdings in *North Georgia Finishing* and *Fuentes v. Shevin*, among others:

> Many of the Court's decisions in this area have required additional procedures to further due process, notwithstanding the apparent availability of injunctive relief or recovery provisions. It was thought that such remedies were too likely to be too bounded by procedural constraints and too susceptible of delay to provide an effective safeguard against an erroneous deprivation.

Id. at 20. The reasoning of the opinion below and adopted by the appellees to the effect that *this* action is all the process which these taxpayers are due is therefore unpersuasive. Although the tax claims asserted against the

appellants and the amicus are large and justify extensive constitutional litigation, most deliquencies are typically far smaller.[7] "Equitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit." *Id.* at 21. These observations are equally applicable here.

B. The Court Below and the Appellees Have Misread this Court's Holding in *Phillips v. Commissioner* Because it is Distinguishable From the Instant Case.

Critical reliance has been placed by both the appellees and the court below upon this Court's "carefully expressed" dicta in *Phillips v. Commissioner,* 283 U.S. 589 (1931). The impropriety of this reliance is revealed through the following analysis:

> [T]he *Phillips* case itself did not involve a jeopardy assessment and the taxpayer's assets could not have been taken or frozen in that case until he had either had, or waived his right to, a full and final adjudication of his tax liability before the Tax Court (then the Board of Tax Appeals). The taxpayer's claim in that case was simply that a statutory scheme which would permit the tax to be assessed prior to any *judicial* determination of his liability—by way of a refund suit or review of the Board of Tax Appeals' decision—was unconstitutional.

Commissioner v. Shapiro, 424 U.S. 614, 631 (1976) (emphasis in original). A careful review of the statutory scheme involved in *Phillips* demonstrates the marked contrast to that involved here. In *Phillips,* although there was a levy and seizure, the taxpayer was not under a danger of

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[7] When the collector began his seizure program in June of 1980, he began with the three largest tax deliquencies in Baxar County. The deliquency alleged against Querner was the largest, and that against Phillips the next greatest. In the ensuing weeks, more than 50 taxpayers had property seized pursuant to the statutes now under review.

losing his property until *after* judicial review of the claim of tax liability. Moreover, the "special need for very prompt action" taken pursuant to the "standards of a narrowly drawn statute" can exist only where that statute, like the one involved in *Phillips*, requires both an official determination that the particular seizure is necessary and justified *and* a statutory avenue for impartial judicial review of that official determination.[8] The Texas statute has neither of these touchstones.

C. The Collector, Now Interested in Delving into the Merits of the Tax Dispute, Should Have Allowed the Tax Suit to Proceed to Trial Rather than Taking the Short Cut of a Seizure.

As he has made abundantly clear, the collector is still attempting to litigate the merits of the deliquency dispute. He has suggested that it was the taxpayers' burden to show "the inaccuracy or illegality of the tax" in the present action. (Motion to Dismiss or Affirm at 4) But even assuming that the taxpayers owed all the taxes claimed and they had no valid defenses to payment,[9] "that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972).

This is neither the time nor the place for the taxpayers to

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[8] *Cf.* 26 U.S.C. § 6851(a)(1), which provides for the immediate assessment of taxes if "the Secretary finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom" or to take other actions "tending to prejudice or to render wholly or partially ineffectual proceedings to collect" taxes. This determination is subject to judicial review. 26 U.S.C. § 7429(b).

[9] Querner, for example, has a legitimate limitations defense the collector sought to cut off through a seizure. Brief of Amicus Curiae at 2, 9-10. Phillips alleged in its answer in the tax suit that it was being taxed for property it did not own.

present their defenses to the tax claims. That forum is in the tax collection suit brought by the collector which he has attempted to moot though the convenient contrivance of a seizure. What defense that he attempted to silence does he now want to hear? What issue that he attempted to stifle does he now want considered? Why did he seek to remove the controversy from the courts in the first place? The taxpayers cannot help but believe that the contentions that this is the proper forum to resolve the merits of the underlying dispute are but a ploy to direct attention away from the constitutional confrontation.

CONCLUSION

This appeal presents an important federal question involving the constitutionality of state tax collection procedures. The motion to dismiss or affirm itself suggests the need for plenary review; indeed, a summary reversal would be in order.

Respectfully submitted,

LEONARD WAYNE SCOTT
Counsel of Record

GARY PINNELL
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Appellants

January 13, 1983

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-677

IN THE

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Appellees.

On Appeal from the Supreme Court of Texas

BRIEF FOR QUERNER TRUCK LINES, INC. AS AMICUS CURIAE

LAWRENCE A. HADDAD
Counsel of Record
THOMAS M. THURMOND
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Amicus Curiae

November 18, 1982

TOSH PRINTING CO., AC (512) 821-6911, SAN ANTONIO, TX. 78217

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IN THE

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Appellees.

On Appeal from the Supreme Court of Texas

BRIEF FOR QUERNER TRUCK LINES, INC. AS AMICUS CURIAE

This proceeding seeks a review of the Supreme Court of Texas holding a state tax seizure statute constitutional. The suit was initially brought by the appellants, Phillips Crane & Rigging of San Antonio, Inc., and Delmar Phillips ("Phillips") against Ben B. Shaw, the Tax Assessor-Collector of Bexar County, Texas ("the collector"). From that adverse decision, this appeal has been taken.

INTEREST OF QUERNER TRUCK LINES

Earlier on the day that Ben B. Shaw seized assets belonging to Phillips Crane & Rigging for allegedly delinquent taxes, he levied upon, seized and took into possession equip-

ment belonging to Querner Truck Lines, Inc. The collector alleged that Querner owed more than $17,000 worth of taxes, dating back to 1960. Just as in the Phillips case, Shaw had previously brought a tax suit against Querner which was still pending at the time of the seizure and remains pending today.[1] Shortly after Phillips brought its action against Shaw, Querner brought a similar action by way of counterclaim in the tax suit.[2] Querner additionally set up as a defense the appropriate statute of limitations, barring suits for the recovery of taxes more than four years delinquent.[3] Phillips alone sought and obtained a permanent injunction from the state district court which was subsequently appealed by Shaw to the Supreme Court of Texas.[4] That court reversed, holding the tax seizure statute constitutional under the Fourteenth Amendment, and Phillips has brought this appeal.

Querner has a direct interest in the outcome of this litigation because its property is also subject to sale through the questioned seizure. If the opinion below is affirmed, there will be a direct and adverse effect upon Querner and its property.

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[1]The suit was cause number 80-TA1-487 in the 45th Judicial District Court of Bexar County, Texas, and was filed on January 31, 1980.

[2]For a time in the lower courts, the Querner action was consolidated with that of Phillips. [J.S. App. 21, 8a]

[3]*TEX. REV. CIV. STAT. ANN.* art. 7298 (Vernon 1960) provides in revelant part "that no suit shall be brought for the collection of delinqent personal property taxes of any taxing authority unless instituted within four (4) years from the time the same shall become delinquent." Like art. 7266, this provision was repealed by the new Texas Tax Code, effective Jan. 1, 1982. That new code not only carries forward the four-year limitations period for filing suit, but also bans seizures for taxes barred by limitations: "Personal property may not be seized and a suit may not be filed: (1) to collect a tax on personal property that has been delinquent for more than four years". *TEX. TAX CODE ANN.* § 33.05(a) (Vernon 1981).

[4]Querner participated in that proceeding as an amicus curiae.

Querner, as an amicus curiae, is also concerned that this Court should be aware of the ramifications the decision below has with respect to allowing the state to collect taxes by seizure that it could not recover through litigation. This point is not present in the Phillips case, but has a direct and important bearing on the over-all question of the constitutional validity of the Texas statute here involved. For these reasons, Querner Truck Lines has obtained the permission of the parties to file this brief and present its views on the instant case to this Court.

ARGUMENT

This case presents the Court with the opportunity to determine whether or not a state tax collector may, consistent the due process clause of the Fourteenth Amendment, seize and sell personal property without judicial supervision of any kind. This Court has never determined the important issue squarely presented by this appeal.

The Decision Below Misinterprets Texas Authority with Respect to the Availability of a Tax Refund Suit Because, Prior to the Dicta in the Decision Below, No Suit for a Refund of Personal Property Taxes Has Ever Been Recognized.

In an effort to demonstrate that a tax refund suit is allowed and is not one against the state requiring legislative permission, the court below has cited four cases. [J.S. App. 4a] These authorities do not establish the proposition for which they are cited; on the contrary, none of them specifically addresses the question of whether a tax refund suit is permitted without legislative permission. Three of these cases, in fact, did not involve state taxes at all.

Crow v. City of Corpus Christi, 146 Tex 588, 209 S.W.2d 922 (1948), was a declaratory judgment suit against a city to invalidate a taxation ordinance. Coupled with that declaratory judgment action was one for a refund of taxes paid to the city. The court found the ordinance unconstitutional and duly invalidated it. A refund was then allowed

and the only issue before the supreme court was whether the taxes were paid under duress. Recognizing the general rule that one who voluntarily pays even an illegal tax may not have it refunded, the court found that implied duress was present and that therefore the taxes had not been voluntarily paid.

Both the opinion of the supreme court and that of the court of civil appeals in *Crow* were silent as to any issue of sovereign immunity. The record in that case revealed that a refund application was apparently presented to the city council. Although the record was not clear as to whether such a procedure was a prerequisite to suit under applicable city charter provisions, it is beyond cavil that a defense of sovereign immunity was never raised in nor ruled upon by the courts.

A similar situation is true with respect to the third case cited by the court below, *Galveston Gas Co. v. County of Galveston,* 54 Tex. 287 (1881). There the suit was against a county for a refund of taxes collected by and for the benefit of the local governmental body rather than for the state. The court's opinion, as well as that on the subsequent appeal,[5] is silent on the issue of governmental immunity. Neither was the issue raised by the pleadings in the district court.

Because these cases do not address, even peripherally, the question of sovereign immunity, it is engaging in dangerous speculation to suggest that they are authority for the proposition for which they are cited. To the extent that the decision below has stated that they so stand, that court has, in dicta, rendered an advisory opinion. This is particularly true since the holdings in these two cases may be reconciled with the taxpayer's position that a suit for a refund of state taxes necessarily requires legislative permission.

It should be noted that sovereign immunity, like any

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[5]*Galveston County v. Galveston Gas Co.,* 72 Tex. 509, 10 S.W. 583 (1889).

other affirmative defense, can be waived by failure to plead it.[6] Not been pled, it cannot be said that the court had an opportunity in either case to examine the issue.

There is also a Texas statute which constitutes a limited waiver of a county's governmental immunity.[7] Suit may be brought on a non-tort claim is presented to the commissioner's court for payment which is not allowed even though

> [t]heoretically, counties enjoy the same degree of immunity as the state. However, the rule granting to the county immunity from suit has been abrogated by the Legislature [citing article 1573]. Thus, the courts have jurisdiction to hear claims against counties, but tort claims have been generally unsuccessful because of the rule that counties are immune from liability for the torts of their agents and employees.

Comment, *The Governmental Immunity Doctrine in Texas — An Analysis and Some Proposed Changes,* 23 *SW. L.J.* 341, 344 (1969). After reviewing this analysis and other Texas authorities, one federal court concluded that "there is no jurisdictional obstacle to the maintaining of the suit against a Texas county. Articles 1572 and 1573 are held to be a legislative waiver of immunities from suit." *Adams v. Harris County,* 316 F. Supp. 938, 950 (S.D. Tex. 1970), *rev'd on other grounds,* 452 F.2d 994 (5th Cir. 1971),[8] *cert. denied,* 406 U.S. 968 (1972).

In *Galveston Gas* a claim was presented to the commissioner's court and rejected. The opinion recognized this fact,

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[6] See *TEX. R. CIV. P.* 94.

[7] *TEX. REV. CIV. STAT. ANN.* art. 1573 (Vernon 1962).

[8] The reversal was based on the fact that it was improper for the federal court's admiraltry jurisdiction to have been invoked under the facts of the case, a concern which in no way detracts from the authority of the quoted language.

and further noted that the taxes received were paid into the county, not the state, treasury. 54 Tex. at 290. Therefore, the county consented to the bringing of the refund action by the rejection of the claim, leaving it to a court of law to test the correctness of the taxpayer's allegations. *Cf. Angelina County v. Kent,* 374 S.W.2d 313, 317-18 (Tex. Civ. App. 1963).

With respect to the holding in *Crow,* it must at the outset be remembered that a declaratory judgment suit is most assuredly one against the state for which legislative permission must be obtained. *W.D. Hayden Co. v. Dodgen,* 158 Tex. 74, 77, 308 S.W.2d 838, 839 (1958). An earlier case correctly announced both the Texas rule and its exception: A declaratory judgment suit is not one against the state where it does not seek to impose liability on the state or compel the performance of a contract, nor is legislative permission required except where the suit is "in essence one for the recovery of money from the State or in which a judgment obtained would be satisfied by payment out of funds in the State treasury." *Cobb v. Herrington,* 144 Tex. 360, 365-66, 190 S.W.2d 709, 712 (1945).

It is important to keep in mind that the taxes exacted from the taxpayers in both *Crow* and *Galveston Gas* did not find their way into the state treasury, but were funds belonging, respectively, to a city and a county. Thus any judgment rendered was necessarily not one which would have been "satisfied by the payment out of funds in the State treasury."

Should Querner or Phillips pay the taxes which the collector has demanded, even under duress and protest, a suit for a refund of that portion of the taxes collected on behalf of

the state[9] would be one requiring legislative approval.[10] Although it would appear that the claims procedure discussed above could possibly provide a remedy against the county's portion of the collections, this would not be so with respect to the state's share.[11] Thus, any refund which might be available as to a portion of the taxes is non-statutory and must be fashioned from the common law.[12] Because of the uncertainty of the availability of a refund, there is clearly no adequate remedy afforded. *Procter & Gamble Distributing Co. v. Sherman,* 2 F.2d 165, 166 (S.D.N.Y. 1924).

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[9] The county tax assessor-collector also gathers tax revenues for the state as well as the county. *TEX. REV. CIV. STAT. ANN.* art. 7254 (Vernon 1960). The Notices of Levy make it clear that state taxes were also included in the alleged delinquency for which the seizure was conducted.

[10] In *Crow* the declaratory judgment action was appropriately brought because it sought to hold an ordinance unconstitutional. Such a suit does not impose liability on the governmental entity nor does it, without more, require the payment of any funds from public monies. In the present appeal, Phillips and Querner brought declaratory judgment suits against a state official in his elected capacity to declare the statute under which he seized their property unconstitutional. No party has suggested that this suit is one requiring prior legislative approbation inasmuch as it clearly falls within the recognized exception. But had these taxpayers sought a judment from the state treasury for taxes collected as a result of the seizure, legislative permission simply would have been required.

[11] As a further illustration of this principle, it should be noted that no refund procedure exists with respect to state ad valorem taxes collected by a county tax assessor-collector. *TEX. TAX.-GEN. ANN. ART.* 1.11A (Vernon 1969); *cf. id.* art. 1.05 (state property taxes not within class of taxes for which a refund action may be instituted).

[12] This is not a particularly easy task. It has been noted that "[t]here is no general statute applicable to property tax payments which makes provision for the payment of taxes under protest." 21 *TEXAS PRACTICE — PROPERTY TAXES,* § 622, at 733-34 (J. Howell ed., 1975). This is critical because those cases which have allowed a refund of other types of taxes have pointed out that there must be a payment under protest before an illegal tax can be refunded. "Texas courts are liberal in granting injunctions and strict in allowing refunds." *Id.* at 734.

The last case relied upon by the court below was added when the opinion was amended on rehearing. *State v. Lain,* 162 Tex. 549, 349 S.W.2d 579 (1961), adds nothing to the discussion. The suit was one to quiet title in land brought against the state and various state officials. The state was dismissed from the action on a plea of sovereign immunity and similar pleas filed by the individual state official defendants were denied. The court held that the individual defendants did not enjoy the state's sovereign immunity, and legislative permission to sue them was not required. *Id.* at 552, 349 S.W.2d at 581. Accordingly, this decision is not in point and has no bearing on the issue here presented.

None of the cases cited by the court below involve taxes collected by the state, save *Austin National Bank v. Shepard,* 123 Tex. 272, 71 S.W.2d 242 (1934), which involved franchise taxes collected pursuant to an unconstitutional statute. *Shepard* is of no assistance to the present problem since it involved an original mandamus proceeding in the supreme court against a state official. It has been well established that such a suit is not one against the state, and therefore requires no prior legislative permission. *Laidlaw Bros. v. Marrs,* 114 Tex. 561, 565, 273 S.W. 789, 792 (1925); *Jernigan v. Findley,* 90 Tex. 205, 211, 38 S.W. 24, 25 (1896); *Morris v. Smiley,* 378 S.W.2d 149, 151 (Tex. Civ. App. 1964).

The distinguisability of the court's authority is demonstrated by *National Biscuit Co. v. State,* 134 Tex. 293, 135 S.W.2d 687 (1940). The identical taxes involved in *Shepard* were once again before the court, but this time the suit was for a refund.[13] Nabisco was required and had first

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[13] In *Shepard* the legislature had already authorized a refund of the unconstitutional tax, the State Treasurer refused to honor a warrant for their refund to the bank. The mandamus proceeding was to compel Shepard to do his ministeral duty of paying the warrant.

obtained permission from the legislature before it instituted suit. *Id.* at 306, 135 S.W.2d at 693. If the theory advanced by the decision below could be correct, then legislative permission was superfluous in both *Nabisco* and *State v. Connecticut General Life Insurance Co.*, 382 S.W.2d 745 (Tex. 1964) (opinion commences, "With legislative permission. . ."). *See also Bullock v. Amoco Production Co.*, 606 S.W.2d 899, 901 (Tex. 1980) (various tax refund statutes "created a right not existing at common law"); *Texas International Airlines, Inc. v. Texas Alcoholic Beverage Comm'n* 566 S.W.2d 693, 696 (Tex. Civ App. 1974) (suit for refund, unless authorized by statute, requires legislative permission).

To the extent that the court below justified holding the tax seizure statute constitutional by speculating that a refund suit would be available, that court has rendered an impermissible advisory opinion. Its dicta has also ignored all previous Texas authority without attempting to overrule existing law. And since each of the cases relied upon are not in point, it cannot be seriously contended that Texas does, in fact, recognize the availability of a refund suit.

Even if a Refund Suit Could Be Brought, the Unreviewable Seizure Cuts Off The Valid Defense of Limitations.

In the suit filed against it by the appellees, Querner has interposed the defense of limitations. Suit was brought for taxes said to have been unpaid from 1960 until 1979, and it is clear that the collector "would certainly be unable to prevail at trial"[14] with respect to the years prior to 1975. But by instituting a summary seizure not subject to judicial review the collector has sought to sidestep the statute of limitations. It is apparent that the collector wants no part of a legal battle fought on level ground in which the taxpayer

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[14] *Commissioner v. Shapiro*, 424 U.S. 614, 633 (1976).

is free to assert its legitimate defenses. This is exactly the sort of oppressive and unconscionable tactic which this Court has found offensive to due process.

This very real danger is one of those which the opinion below fails to consider. Assuming for the moment that a refund suit could be fashioned from Texas common law, the taxpayer would not be able to recover all the taxes improperly collected. Under the approach adopted by the court below, the taxpayer would be required to pay all of the delinquent taxes claimed by the collector in order to regain its property and then sue for a refund. The taxpayer would be in the unenviable position of having to use the statute of limitations as a sword rather than a shield. Since it is not proper to use limitations offensively, a taxpayer such as Querner would be unable to recover its taxes for the years barred by limitations, even though the collector would have been unable to obtain a judgment for those same years if he had proceeded by judicial process rather than his own self-help remedy. Besides the obvious equal protection problem created by having unjustifiably disparate results,[15] any ultimate judicial determination of the refund action would be less than adequate. *Phillips v. Commissioner,* 283 U.S. 589, 597 (1931).

Were a Refund Suit Otherwise Available, It Could Not Constitute the Adequate Post-Seizure Review Required by Due Process.

The court below has correctly noted that, following a seizure for delinquent taxes, the "Collector must hold the property for ten days after seizure and then may sell the seized property at public auction." [J.S. App. 4a] Without completing its thought, that court has implied that a taxpayer should, after the seizure, pay the taxes claimed by the collector and then sue for a refund.

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[15] Cf. Mills v. Habluetzel,__U.S.____, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982).

This begs the question. Such reasoning presupposes that the taxpayer will be in a position to raise, within ten days of the seizure, the funds necessary to redeem his property.[16] If he is not, he will lose his property and will recover only its dollar value if a refund action is successful.[17] Moreover, this reasoning overlooks the very real possiblility that the property sesized – as here – constitutes the operating assets of a business integral to that business' daily activities.[18] Both of these situations underscore the necessity for a prompt post-seizure review where there is no predeprivation judicial scrutiny of a proposed seizure.

What the court below has failed to consider is that some items of property which could be seized to satisfy a purported tax delinquency may be vital to the taxpayer. In a business context, a seizure of operating assets without the ability to promptly recover them could well lead to an injury which a successful refund suit could never recompense. It is easily foreseeable that the unreviewed taking of business equipment and its subsequent sale at public auction could lead to the laying off of some of the taxpayer's employees

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[16] Under the statutes here involved, there is no provision for the posting of a bond to replevy the seized property.

[17] Just as there is no statute providing for a refund of the taxes here involved, there is no provision for the recovery of interest on any overpayments. The nonavailability of interest was a concern of this Court (although it did not decide whether there was a constitutional right to recover interest) in *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 515 (1981). The failure to pay interest on taxes which have been illegally collected has been held to render the refund remedy inadequate. *E.g., United States v. Livingston*, 179 F. Supp. 9, 15 (E.D.S.C.) (three-judge court), *aff'd per curiam*, 364 U.S. 281 (1960); *Procter & Gamble Dist. Co. v Sherman*, 2 F.2d 165, 166 (S.D.N.Y. 1924). Additionally, the taxpayer would be unable to recover any of his consequential damages as part of the refund suit.

[18] Shaw seized two cranes belonging to the appellants and six van trailers owned by Querner.

and a severe negative impact on the taxpayer's business.[19] Given that it would necessarily require some period of time–perhaps years[20]–for a refund suit to be concluded, a taxpayer can well suffer severe injury as a direct result of the deprivation at issue long before there is an opportunity for judicial review. Under such circumstances, the collector would be able to put off his showing of "probable cause" until long after the seizure had taken place. If the seizure was in error, it would be some time before the taxpayer would be able to show it. The Constitution requires a more rapid review. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975).

In addition to a taxpayer losing his property without a *prompt* post-seizure review, a refund suit cannot properly substitute for that review because different issues would be involved. At a post-seizure hearing, the collector would be required to show that there was some reasonable basis in fact for his actions. *See Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976). A refund suit, on the other hand, would place the burden on the taxpayer to show that taxes were not owing, at least not in the amount claimed by the collector. The opinion below thus shifts the burden of proof as to the propriety of the seizure from the collector to the taxpayer, and changes the issue to be reviewed from the correctness of the seizure to the merits of the dispute; this is simply not consistent with the concept of due process.

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[19] *Cf. Commissioner v. Shapiro*, 424 U.S. 614, 631 (1976), where this Court noted that "it is very doubtful that the need to collect the revenues is a sufficient reason to justify causing irreparable injury without a prompt post-seizure inquiry of any kind into the Commissioner's basis for his claim." Surely the adverse effects on a business are no less an irreparable injury than that found to exist in *Shapiro*.

[20] *Cf. Rosewell v. LaSalle National Bank*, 423 U.S. 503, 519-520 (1981). Mr. Justice Brennan, concurring in *Laing v. United States*, 423 U.S. 161, 187 (1976), questioned whether a denial of a taxpayer's forum for review for up to 60 days was consistent with the due process requirement of a prompt post-seizure review.

CONCLUSION

For these reasons, the amicus curiae agrees with the appellants that this Court should note probable jurisdiction and reverse the judgment of the court below.

Respectfully submitted,

LAWRENCE A. HADDAD
Counsel of Record
THOMAS M. THURMOND
442 Dwyer
San Antonio, Texas 78204
(512) 226-0311
Counsel for Amicus Curiae

November 18, 1982